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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1301, 1305, and 1308

[Docket No. DEA-375]

Schedules of Controlled Substances: Placement of Thiafentanil in Schedule II

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: On August 26, 2016, the Drug Enforcement Administration (DEA) published in the Federal Register an interim final rule with request for comments placing the substance thiafentanil, including its isomers, esters, ethers, salts and salts of isomers, esters and ethers, in schedule II of the Controlled Substances Act. This final rule adopts that interim final rule without change.

DATES: The effective date of this rule is [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Legal Authority

Under the Controlled Substances Act (CSA), as amended in 2015 by the Improving Regulatory Transparency for New Medical Therapies Act (Public Law 114-89), where the Drug Enforcement Administration (DEA) receives notification from the Department of Health and Human Services (HHS) that the Secretary has indexed a drug under section 572 of the Federal Food, Drug, and Cosmetic Act (FDCA), the DEA is required to issue an interim final rule, with opportunity for public comment and to request a hearing, controlling the drug not later than 90 days after receiving such notification from HHS and subsequently to issue a final rule. 21 U.S.C. 811(j). When controlling a drug pursuant to section 811(j), the DEA must apply the scheduling criteria of subsections 811(b), (c), and (d) and section 812(b). 21 U.S.C. 811(j)(3).

Background

On August 26, 2016, the DEA published an interim final rule with request for comments [81 FR 58834] to make thiafentanil (including its salts) a schedule II controlled substance(s). See 21 CFR 1308.12(c)(29) (DEA Controlled Substance Code 9729).

Over time, alternative chemical names have been used to describe this same specific substance. In the preamble to the interim final rule, the DEA provided “4-(methoxycarbonyl)-4-(N-phenmethoxyacetamido)-1-[2-(thienyl)ethyl]piperidine”¹ as the chemical name for thiafentanil. However, the DEA believes it is more accurate to use “methyl 4-(2-methoxy-*N*-phenylacetamido)-1-(2-(thiophen-2-yl)ethyl)piperidine-4-

¹ The interim final rule also mentioned the other chemical name, 4-(methoxycarbonyl)-4-(*N*-phenylmethoxyacetamido)-1-[2-(2-thienyl)ethyl]piperidine in the section entitled “Background, Legal Authority, and Basis for This Scheduling Action”.

carboxylate)’² in the preamble of this final rule. It bears emphasis that the chemical that is the subject of this final rule is the same substance that was the subject of the interim final rule. The DEA simply is using an alternative chemical description to refer to that same substance in this preamble.

Thiafentanil, a potent opioid, is an analogue of fentanyl. In June 2016, the Food and Drug Administration (FDA) reviewed and determined that the product Thianil (thiafentanil oxalate, a salt form of thiafentanil) met the requirements for addition to the Index of Legally Marketed Unapproved New Animal Drugs for Minor Species (the Index) (21 U.S.C. 360ccc-1) as set forth by the Minor Use and Minor Species Animal Health Act of 2004 (MUMS Act)³. As discussed in the preamble to the interim final rule, the HHS provided the requisite notification to DEA that HHS/FDA added Thianil (thiafentanil oxalate) to the Index (Minor Species Index File (MIF) 900000) under section 572 of the FDCA.

The DEA based its scheduling decision, and issuance of the interim final rule, on 21 U.S.C. 811(j), the HHS’s November 2011 scientific and medical evaluation and scheduling recommendation, the HHS’s March 2016 supplemental analysis, the MUMS Act indication by the HHS/FDA, and the DEA’s determination. The interim final rule provided an opportunity for interested persons to file written comments, as well as a request for hearing or waiver of hearing, on or before September 26, 2016.

² Other chemical names have been used for thiafentanil. The HHS referred to the substance as “4-(methoxycarbonyl)-4-(N-phenylmethoxyacetamido)-1-[2-(thienyl)ethyl]piperidine” and “4-methoxycarbonyl-4-(N-phenyl-methoxyacetamido)-1-(2’-(2’’-thienyl)ethyl]-piperidine” in its November 2011 scientific and medical evaluation and scheduling recommendation, and as “4-(methoxycarbonyl)-4-(N-phenylmethoxyacetamido)-1-[2-(thienyl)ethyl]piperidinium” in its March 2016 supplemental analysis.

³ The MUMS Act amended the FDCA to allow for the legal marketing of unapproved new animal drugs intended for use in minor species.

Comments Received

The DEA received one comment from the American Veterinary Medical Association supporting the interim final rule to control thiafentanil as a schedule II substance of the CSA.

DEA Response. The DEA appreciates the support for this rulemaking.

The DEA did not receive any requests for hearing or waiver of hearing. Based on the rationale set forth in the interim final rule, the DEA adopts the interim final rule, without change.

Requirements for Handling Thiafentanil

As indicated above, thiafentanil has been a schedule II controlled substance for more than two years by virtue of the interim final rule issued by the DEA in 2016. Thus, this final rule does not alter the regulatory requirements applicable to handlers of thiafentanil that have been in place since that time. Nonetheless, for informational purposes, we restate here those requirements. Thiafentanil is subject to the CSA's schedule II regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, reverse distribution, dispensing, importing, exporting, research, and conduct of instructional activities and chemical analysis with, and possession involving schedule II substances, including the following:

1. *Registration.* Any person who desires to handle thiafentanil (manufacture, distribute, reverse distribute, dispense, import, export, engage in research, or conduct instructional activities or chemical analysis with, or possess), must be registered with the DEA to conduct such activities pursuant to 21 U.S.C. 822, 823, 957, and 958 and in accordance with 21 CFR parts 1301 and 1312.

2. *Quota.* Only registered manufacturers are permitted to manufacture thiafentanil in accordance with a quota assigned pursuant to 21 U.S.C. 826 and in accordance with 21 CFR part 1303.

3. *Disposal of stocks.* Upon obtaining a schedule II registration to handle thiafentanil, and if subsequently, any person who does not desire or is not able to maintain a schedule II registration must surrender all quantities of currently held thiafentanil, or may transfer all quantities of currently held thiafentanil to a person registered with the DEA in accordance with 21 CFR part 1317, in addition to all other applicable federal, state, local, and tribal laws.

4. *Security.* Thiafentanil is subject to schedule II security requirements and must be handled and stored pursuant to 21 U.S.C. 821 and 823, and in accordance with 21 CFR 1301.71–1301.93.

5. *Labeling and Packaging.* All labels, labeling, and packaging for commercial containers of thiafentanil must comply with 21 U.S.C. 825 and 958(e), and be in accordance with 21 CFR part 1302. In addition, thiafentanil is subject to additional labeling requirements provided by the FDA. Thiafentanil must be labeled, distributed, and promoted in accordance with the Index entry of the new animal drug and the FDA may remove a new animal drug from the Index if the conditions and limitations of use have not been followed. 21 U.S.C. 360ccc-l(d)(1)(G); (f)(1)(F). The labeling of an indexed new animal drug must prominently state that the extra-label use of the product is prohibited. 21 U.S.C. 360ccc-l(h).

6. *Inventory.* Every DEA registrant who desires to possess any quantity of thiafentanil must take an inventory of thiafentanil on hand, pursuant to 21 U.S.C. 827 and 958, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

Any person who becomes registered with the DEA to handle thiafentanil must take an initial inventory of all stocks of controlled substances (including thiafentanil) on hand on the date the registrant first engages in the handling of controlled substances, pursuant to 21 U.S.C. 827 and 958, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

After the initial inventory, every DEA registrant must take a new inventory of all stocks of controlled substances (including thiafentanil) on hand every two years, pursuant to 21 U.S.C. 827 and 958, and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

7. *Records and Reports.* Every DEA registrant must maintain records and submit reports for thiafentanil, or products containing thiafentanil, pursuant to 21 U.S.C. 827 and 958(e), and in accordance with 21 CFR parts 1304, 1312 and 1317.

8. *Orders for thiafentanil.* Every DEA registrant who distributes thiafentanil is required to comply with order form requirements, pursuant to 21 U.S.C. 828, and in accordance with 21 CFR part 1305.

9. *Prescriptions and other dispensing.* All prescriptions for thiafentanil or products containing thiafentanil must comply with 21 U.S.C. 829, and be issued in accordance with 21 CFR parts 1306 and 1311, subpart C. Moreover, given that thiafentanil is not the subject of an approved new drug application under the FDCA, and that it is only allowed under the MUMS Act amendments to the FDCA to be marketed for extremely limited use in minor species, DEA would not consider any dispensing of thiafentanil for human use

to be for a legitimate medical purpose within the meaning of the CSA. Likewise, DEA would not consider any dispensing of thiafentanil for animal use beyond the scope of the drug's labeling authorized under the MUMS Act amendments to the FDCA to be for a legitimate medical purpose within the meaning of the CSA.

10. *Manufacturing and Distributing.* In addition to the general requirements of the CSA and DEA regulations that are applicable to manufacturers and distributors of schedule II controlled substances, such registrants should be advised that (consistent with the foregoing considerations) any manufacturing or distribution of thiafentanil may only be for the legitimate purposes consistent with the drug's labeling authorized under the MUMS Act, or for research activities authorized by the FDCA and CSA.

11. *Importation and Exportation.* All importation and exportation of thiafentanil must be in compliance with 21 U.S.C. 952, 953, 957, and 958, and in accordance with 21 CFR part 1312.

12. *Liability.* Any activity involving thiafentanil not authorized by, or in violation of, the CSA or its implementing regulations, is unlawful, and may subject the person to administrative, civil, and/or criminal sanctions.

Regulatory Analyses

Administrative Procedure Act

This final rule adopts, without change, the amendments made by the interim final rule that are already in effect. Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553) generally requires notice and comment for rulemakings. However, Public Law 114-89, which was signed into law in 2015, amended 21 U.S.C. 811 to provide that in cases where a new drug is (1) approved or indexed by the Department of Health and

Human Services (HHS) and (2) HHS recommends control in CSA schedule II–V, the DEA shall issue an interim final rule scheduling the drug within 90 days. This action was taken August 26, 2016. Additionally, the law specifies that the rulemaking shall become immediately effective as an interim final rule without requiring the DEA to demonstrate good cause.

Executive Order 12866, 13563, and 13771, Regulatory Planning and Review, Improving Regulation and Regulatory Review, and Reducing Regulation and Controlling Regulatory Costs

In accordance with Public Law 114-89, this scheduling action is subject to formal rulemaking procedures performed “on the record after opportunity for a hearing,” which are conducted pursuant to the provisions of 5 U.S.C. 556 and 557. The CSA sets forth the procedures and criteria for scheduling a drug or other substance. Such actions are exempt from review by the Office of Management and Budget (OMB) pursuant to section 3(d)(1) of Executive Order 12866 and the principles reaffirmed in Executive Order 13563.

This final rule is not an Executive Order 13771 regulatory action pursuant to Executive Order 12866 and OMB guidance⁴.

Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation,

⁴ Office of Management & Budget, Executive Office of The President, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017 Titled “Reducing Regulation and Controlling Regulatory Costs” (Feb. 2, 2017).

provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13132, Federalism

This rulemaking does not have federalism implications warranting the application of Executive Order 13132. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

This final rule does not have tribal implications warranting the application of Executive Order 13175. It does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) applies to rules that are subject to notice and comment under section 553(b) of the APA. As noted in the above discussion regarding applicability of the Administrative Procedure Act, the DEA was not required to publish a general notice of proposed rulemaking prior to this final rule. Consequently, the RFA does not apply.

Unfunded Mandates Reform Act of 1995

In accordance with the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501 *et seq.*, the DEA has determined and certifies that this action would not result in any Federal mandate that may result “in the expenditure by state, local, and tribal

governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted for inflation) in any one year.” Therefore, neither a Small Government Agency Plan nor any other action is required under UMRA of 1995.

Paperwork Reduction Act of 1995

This action does not impose a new collection of information requirement under the Paperwork Reduction Act of 1995. 44 U.S.C. 3501–3521. This action would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Congressional Review Act

This final rule is not a major rule as defined by the Congressional Review Act (CRA), 5 U.S.C. 804. However, pursuant to the CRA, the DEA is submitting a copy of this final rule to both Houses of Congress and to the Comptroller General.

List of Subjects

21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Security measures.

21 CFR Part 1305

Drug traffic control, Reporting and recordkeeping requirements.

21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

**PART 1301—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND
DISPENSERS OF CONTROLLED SUBSTANCES**

**PART 1305—ORDERS FOR SCHEDULE I AND II CONTROLLED
SUBSTANCES**

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

Accordingly, the interim final rule amending 21 CFR parts 1301, 1305, and 1308, which was published on August 26, 2016 (81 FR 58834), is adopted as a final rule without change.

Dated: June 10, 2019.

Uttam Dhillon,
Acting Administrator.

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